

State of Hawai'i  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of State Parks  
Honolulu, Hawai'i 96813

May 27, 2011

Board of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

**SUBJECT:** Contested Case Request Regarding a Curatorship Agreement between State Parks and the Betty C. Kanuha Foundation for a Portion of Keolonāhihi State Historical Park, North Kona, Island of Hawai'i

**PETITIONER:** L. Mikihala Roy and Ka 'Ohana o Kaluaokalani

**BACKGROUND:**

The Curator Program began in 1987 to encourage community involvement in the care and management of historic and cultural sites on State-owned properties. Over the years, the program has expanded to include natural resources in the parks, such as botanical gardens and wetlands. The curator responsibilities have also evolved to include interpretation, assistance with visitor services, and site restoration. The proposed agreement for Keolonāhihi State Historical Park (SHP) is being called a Kahu Agreement to reflect the cultural nature of the site and the wishes the families involved in the care of the site.

Keolonāhihi SHP encompasses 30 acres on the *mauka* and *makai* sides of Ali'i Drive in the *ahupua'a* of Holualoa 4 in North Kona on the island of Hawai'i. The initial 12 acres of the cultural complex on the *makai* side of Ali'i Drive were acquired by the State in 1980 to protect and preserve the significant archaeological and cultural sites associated with one of the seven royal centers of Kona, circa A.D. 1600. The historical park was expanded in 1998 with the donation of a 16-acre parcel on the *mauka* side of Ali'i Drive that encompasses the Keākealaniwahine complex. Another 1.25-acre parcel adjacent to the Keākealaniwahine complex was acquired in 2006. A Management Plan and Environmental Impact Statement were prepared in 1997 for the 12 acres on the *makai* side of Ali'i Drive, but funding has not been available to update and revise these documents to include the other 18 acres acquired since 1997. Therefore, the Kahu Agreement only addresses the 12 acres on the *makai* side of Ali'i Drive at this time.

Several families with cultural ties to the Keolonāhihi area approached State Parks in 2003 and expressed an interest in clearing the vegetation as a first step to restoring the site. They also wished to provide educational programs by having schools and community groups participate in this project. A number of meetings were held between State Parks and the families from 2003 to 2008 to discuss the curator program and how an agreement might be established. The execution of an agreement was delayed as families discussed the details of the agreement and how they wished to organize and be represented in the agreement document.

In 2007, State Parks expressed concern about the ongoing clearing work at the site without an agreement and confirmed with the families that they were still interested in an agreement. Former Chairperson Laura Thielen met with the families at the site on March 30, 2008 and recommended that all families be given the opportunity to be named and sign the agreement as the best way to move an agreement forward. The agreement between the families of Keolonāhihi and the Division of State Parks would be for a 5-year term and each year, the opportunity will be given to families to sign onto the agreement if they should choose not to do so upon the initial execution of the agreement. An agreement with these terms was submitted to the Board of Land and Natural Resources (Board) for approval of the agreement in concept on June 27, 2008.

Testimony provided to the Board at the June 27, 2008 meeting by members of Kanuha family requested that the Betty C. Kanuha Foundation be named as a signatory on the agreement. As a not-for-profit organization, the Betty C. Kanuha Foundation would provide an organizational framework and a means of accepting donations to support the work at Keolonāhihi. The Board directed State Parks to amend the agreement to include a signature line for the Betty C. Kanuha Foundation and said that the revised agreement would be subject to final approval by the Board and the Department of the Attorney General.

In compliance with the Board's amendment, the agreement was revised and shared with all the interested parties. Former Chairperson Thielen followed up with a meeting at Keolonāhihi on July 10, 2008 to discuss the revisions and any other concerns. The individuals and families said they would meet and discuss the revised agreement amongst themselves. State Parks made the agreement available for signature on August 11, 2008 but individuals and families indicated that they had not met to discuss the agreement and were not ready to sign.

Another version of the agreement was presented to State Parks on August, 2009 on behalf of the Kanuha family. State Parks shared this version with the interested parties along with a request that those still interested in participating in the agreement contact State Parks. This version of the agreement gives families associated with Keolonāhihi an opportunity to participate as volunteers and advisors. This revised agreement was submitted to the Board on November 19, 2009 and the Board approved State Parks request to enter into a curatorship agreement with the Betty C. Kanuha Foundation for a 3-year period and providing the opportunity for others to sign onto the agreement as volunteers and advisors.

Following the Board's approval of the agreement in concept, a contested case request was made by L. Mikahala Roy and Ka 'Ohana o Kaluaokalani. The joint petition was filed within the time allowed by the rules and then forwarded to the Department of the Attorney General (AG) with a request by the department for legal assistance.

#### **ANALYSIS:**

In determining whether the petitioners are entitled to a contested case hearing to review the Board's action to enter into a curatorship agreement with the Betty C. Kanuha Foundation for a portion of Keolonāhihi SHP, the Department must look at both whether there is a right to a contested case, as defined in Hawaii Revised Statutes ("HRS") §91-1 and whether the particular petitioner has standing to participate in the contested case hearing. In the current case, there is no requirement for the Board to hold a contested case hearing from its decision to enter into a

curatorship agreement for the Keolonāhihi SHP. Accordingly, the Board does not have to reach the question of whether the petitioners have standing to participate in a contested case hearing.

HRS §91-1 defines a contested case as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing." An agency hearing refers only to such hearing "held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." HRS §91-1. Hawaii's courts have interpreted these definitions to mean that "[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *E&J Lounge Operating Co. Inc. v. Liquor Comm'n of the City and County of Honolulu*, 118 Haw. 320, 330, 189 P.3d 432, 442 (2008) (hereinafter "E&J") (citing *Pub. Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) [hereinafter, *PASH*]).

#### **A. No Requirement to Hold a Hearing**

A hearing is required by law if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making or if a hearing is mandated by due process. *Bush v. Hawaiian Homes Com'n*, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994). In this case, a hearing was not required to be held, either by applicable statutes or rules or by due process.

##### **1. No statute or rule requirement to hold a hearing**

Chapter 184, HRS governs state parks and recreation areas with statutes addressing the state parks special fund, state parks acquisitions, rules, and enforcement and penalties. None of the provisions in this chapter contain a requirement for a hearing to be held in connection with actions related to the state parks. Chapter 13-146, Hawaii Administrative Rules ("HAR") are the administrative rules that generally govern the Hawaii state park system, including user fees, closing of state parks, permitted and prohibited activities in state parks, and camping and permits. None of the administrative rules within this chapter contain a requirement for a hearing to be held in connection with any of the activities or uses within state parks.

The petition for a contested case hearing cites Chap. 13-300, HAR as the authority for this action. Chap. 13-300, HAR pertains to the rules of practice and procedure relating to burial sites and human remains. Although this administrative rules chapter does contain a section pertaining to administrative hearings, it is inapplicable in this case.

Under the applicable statutory and rule sections, no hearing was mandated to be held by the Board of Land and Natural Resources prior to its making a decision to enter into a curatorship agreement for a state park. A contested case hearing is not required by statute or rule in this case.

##### **2. No due process requirement to hold a hearing**

Hawaii's courts have developed a two-step analysis to determine if a claimant is entitled to a due process hearing. First, the court looks at whether the particular interest is "property" within the meaning of the due process clauses of the federal and state

constitutions. Second, the court determines what specific procedures are required to protect the interest asserted.

Property rights are protected by the Constitution. They are not, however, "created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *In re Robert's Tours & Transp., Inc.*, 104 Haw. 98, 106, 85 P.3d 623, 631 (2004) (quoting *Board of Regents*). In this instance, the petitioners have not claimed that they were entitled to a contested case as a matter of due process. Nor is there a Constitutional mandate that requires a contested case hearing.

## **B. Specific Claims of Petitioner**

In the written petition filed in this matter, Ka 'Ohana has stated that it is an extended 'ohana of Hawaiian families tracing their lineage back to powerful Kona *ali'i* and *kāhuna* who resided and are buried at Keolonāhihi and Kaluaokalani. They believe it is both their right as well as their responsibility to take care of the sacred lands of their ancestors and assure that they are protected in perpetuity. They assert that their relatives have put in thousands of hours of community service for this area, as members of the State's Kamoā Point Commission and various boards of community organizations that contributed to preserving this sacred place. Ka 'Ohana asserts that it has a long and undeniable history of "caretakership" of this area.

Ka 'Ohana's members are also practitioners who remain true to the faith of their ancestors. They pass this knowledge and faith on to their children, relatives, and the public. Ka 'Ohana asserts that its members have been stewards of the land and *kupuna* who have resided, and are buried, at Keolonāhihi for many years.

Ka 'Ohana's main disagreement with the decision of the Board is that it believes that a secular government cannot turn over a sacred site to a non-profit organization created under the laws of the secular government when the true religious practitioners and protectors of the sacred lands are present. Ka 'Ohana believes that the granting of authority over sacred lands to such a non-profit is a violation of the First Amendment rights of the practitioners and traditional caretakers. The relief that petitioners are requesting is for the curator agreement with the Betty C. Kanuha Foundation to be terminated and for the Board to enter into a new curator agreement with Ka 'Ohana.

Ka 'Ohana has not cited to any statutory or rule authority to support its right to be the curator of the state land instead of the Betty C. Kanuha Foundation.<sup>1</sup> Ka 'Ohana's references to constitutional provisions do not support a finding that Ka 'Ohana has a property interest

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<sup>1</sup> There are no terms in the curator agreement that would prevent the members of Ka 'Ohana from exercising their traditional and customary rights and religious practices at the site.

in being the contracted curator in the curatorship agreement with the State.<sup>2</sup> As stated above, the Constitution is not a source of property rights. The Constitution protects property rights bestowed by other laws. Ka 'Ohana has not pointed to any law that raises Ka 'Ohana's interest in being the contracted caretaker of state land to the level of an entitlement. Ka 'Ohana has not shown that it has rights in the caretaker agreement that constitute a property interest and is entitled to protection through a contested case proceeding.

**C. Approval of the Curatorship Agreement Did Not Determine the Rights, Duties, or Privileges of Specific Parties**

The second part of the inquiry as to whether a contested case hearing is required is whether the decision would determine the rights, duties, or privileges of specific parties. *E&J*, 118 Haw. at 330, 189 P.3d at 442. The decision by the Board to approve entering into a curatorship agreement with the Betty C. Kanuha Foundation did not determine the rights, duties, or privileges of specific parties.

The requirement to hold a contested case is found in chapter 91, HRS, also referred to as the Hawaii Administrative Procedures Act (HAPA). An agency must follow HAPA when it is "acting in either a rule making capacity (quasi-legislative) or in the adjudication of a contested case (quasi-judicial)." *Sharma v. State, Dept. of Land and Natural Resources*, 66 Haw. 632, 637, 673 P.2d 1030, 1033 (1983). The Board was acting in neither of those capacities in this case when it made the decision to enter into a curatorship agreement with the Betty C. Kanuha Foundation.

An administrative agency has more duties than just rule making or adjudication. *Id.*, 66 Haw. at 637, 673 P.2d at 1034. An agency must also deal with matters related to its internal management. Matters related to the internal management of an agency do not fall within the purview of HAPA and as such, no contested case hearings are required. *Id.*

In the current case, the decision by the Board to enter into a curatorship agreement with a specific party was a decision directly related to the management of state lands. The terms of the curatorship agreement state that the aim of the curator agreement is for the curators to assist the Division of State Parks and the State Historic Preservation Division to better maintain significant cultural and natural resources and protect them from vandalism, natural factors, and unintentional human actions and to provide the State's citizens greater access to view and understand the historic and natural resources of the state. All work is to be done only after consultation and approval of State Parks. The curator agreement further provides that the State will continue to manage and be responsible for the site area. The curator agreement is clearly for the purpose of helping the State to continue to manage and maintain its own property and thus constitutes internal management, to which HAPA does not apply.

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<sup>2</sup> As stated earlier, the curator agreement allows other families and individuals to sign on to the agreement as Advisors/Volunteers. Ka 'Ohana could sign on to the agreement as additional Advisors/Volunteers.

Based on this analysis, Staff finds that:

1. The petitioners do not have a legal right, duty, or privilege entitling them to a contested case proceeding.
2. A contested case is not required by law.

**RECOMMENDATION:**

Staff therefore recommends that the Board of Land and Natural Resources deny the request for a contested case by L. Mikahala Roy and Ka 'Ohana o Kaluaokalani in regards to the execution of a curator agreement between State Parks and the Betty C. Kanuha Foundation for the Foundation to serve as curators or *kahu* for a 12-acre portion of Keolonāhihi State Historical Park.

It is also recommended that the Board delegate authority to the Chairperson of the Department of Land and Natural Resources to finalize the curatorship agreement with the Betty C. Kanuha Foundation and previously identified families and interested parties subject to approval of the agreement as to form by the Department of the Attorney General.

Respectfully submitted,



DANIEL S. QUINN  
State Parks Administrator

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, Jr., Chairperson